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No. 84-468

In the Supreme Court of the United States

October Term, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,

Petitioners,

v.

CLEBURNE LIVING CENTER, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The briefs of Respondents and their supporting Amici rely on emotion rather than fact. The City Ordinance described by them as one barring the mentally retarded from living in the City of Cleburne simply does not exist. The mentally retarded do live in Cleburne, they attend school in Cleburne and they work in Cleburne. (R. Vol. II, pp. 214-215). The Ordinance under review in this case regulates the type structure and location, which can be anywhere in the City,[1] of a business which provides habilitation

[1]Contrary to the claims of Respondents and certain Amici, it should be noted that the resolution (ordinance) in *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*, 314 S.E.2d 218, 220 (Ga. 1984), appeal dismissed, 105 S.Ct. 57 (1984), was more restrictive than the ordinance in the case at bar because the *Macon* ordinance precluded a home for a maximum of five mentally retarded adults with a maximum of two surrogate parents from operating in single-family residential districts.

services and training to those mentally retarded persons who are not capable of independent living. It affects only this small sub-group of the mentally retarded.

I. THE ORDINANCE AND THE CITY COUNCIL DECISION SATISFY THE RATIONAL BASIS STANDARD OF REVIEW WHICH IS THE APPROPRIATE STANDARD TO BE APPLIED IN THIS CASE

When faced with a similar emotional issue involving the public funding of nontherapeutic abortions in *Maher v. Roe*, 432 U.S. 464, 479, 97 S.Ct. 2376, 2385 (1977), this Court concluded that its decision that the regulation at issue was constitutional was

> not based on a weighing of [the regulation's] wisdom or social desirability, for this Court does not strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." (citations omitted)

The Court further recognized that its decision should be tempered with judicial self-restraint because the "appropriate forum for [the] resolution [of sensitive policy choices] in a democracy is the legislature." *Id.* 432 U.S. at 479.[2]

Respondents and their Amici are supporting the same type practices that caused Congress and the courts to support a national policy of moving retarded persons out of state institutions because of the overcrowded and inadequate facilities. Yet, they criticize the City of Cleburne for not permitting the same overcrowded conditions. The City of Cleburne refused to permit Respondents to stack three

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[2]The Fifth Circuit's dissent to the denial of the rehearing en banc likewise cautioned judicial self-restraint in the case at bar. See J.A. 143.

and four unrelated adults in one bedroom and found that two and a half baths are not enough for thirteen residents and two staff members. As will be pointed out hereinafter, the State of Texas agrees with the City of Cleburne that thirteen mentally retarded residents is too large a number to be in one habilitation center and will not permit more than six per unit. Two of the Council members who voted to deny the special use permit had experience with the mentally retarded and would not permit the same unacceptable crowded conditions in Cleburne that caused so many problems in state institutions. See J.A. 26 and J.A. 30.

Speaking on the effect of improper housing conditions on the occupants, this Court has stated that such conditions

> . . . may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden.

Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102 (1954).

The Respondents as well as a number of the Amici have shifted the emphasis of their argument away from the question of the propriety of "heightened" judicial review and have focused instead on whether the Ordinance passes the rational basis level of review. The District Court held that it did pass the rational basis test and the Solicitor General points out that the Fifth Circuit did not consider the question.

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118 (1926), this Court established the standard for a zoning classification which is the lodestar for this Court's subsequent zoning decisions:

> If the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control. (emphasis added)

The Fourteenth Amendment "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective," and a statutory classification "will not be set aside if any set of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105 (1961).

Therefore, as this Court stated in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536 (1974), it does not sit to determine the desirability of the proposed ICF-MR project, but rather to determine if the City's Ordinance regulating the location and structure of the ICF-MR facility rests on any set of facts that are fairly debatable to justify it.

Respondents argue that there is no distinction between the proposed ICF-MR facility and a boarding house, but there is a difference. Any mentally retarded man or woman could live in a boarding house in the City of Cleburne if he or she were capable of independent living. However, an ICF-MR facility for the mentally retarded is not a boarding house. It is a for-profit custodial care operation, classified by the Texas Department of Health as an "institution",[3] which requires more than room and board. It also requires that only those who lack the skills of independent living may be kept there under the federally funded contract. Tex. Dept. of Human Resources, 40 TAC § 27.1002 (1981) requires that an ICF-MR provide on a regular basis, active treatment

> and services to mentally retarded individuals who because of their mental retardation or related condition require care and services *(above the level of room and*

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[3]Pl. Ex. 25, p. 1, R. Vol. III, 290, *Minimum Licensing Standards for Facilities Serving the Mentally Retarded Citizens of Texas*: "for the habilitation of individuals based on an active treatment program in *institutions* of the character defined and covered herein." (emphasis supplied)

> *board)* which can be made available to them only through institutional facilities. *These individuals cannot function independently.* Supervision is necessary because of mental or physical impairment, or a combination of impairments. (emphasis supplied)

Also, 40 TAC § 27.2703, 9 Tex. Reg. 5205 (1984) printed at 9 Tex. Reg. 2140 (1984) mandates that:

> [a]n ICF-MR must meet the requirements for a state license to provide on a regular basis, health-related care and services to individuals whose mental or physical condition require services that:
>
> (1) are *above the level of room and board*, and
>
> (2) can be provided only by an institution. (emphasis supplied)

The reason for requiring that an applicant obtain a special use permit to operate such a business for the mentally retarded is because the mentally retarded by definition possess significantly subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and, thus, the mentally retarded impact the community in a manner different than any of the other groups or entities which are not required to obtain a special use permit to operate their businesses within the City of Cleburne because none of the other groups or entities definitionally possess the defining characteristics of the mentally retarded.[4] These unique characteristics, which in-

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[4]The dissent to the Fifth Circuit's denial of rehearing en banc articulated the differences between the mentally retarded and the nonretarded and other groups for which special arrangements are often made. See J.A. 140-141. See Pl. Ex. 27, p. 2, R.Vol. III, pp. 287, 288, and Tex. Rev. Civ. Stat. Ann. art. 5547-300, § 3 (7) (Vernon Supp. 1985), and see generally discussion in Petitioners' Brief at pp. 13-15.

dividuals classified as mentally retarded possess,[5] affect the health, safety and general welfare not only of the residents of the habilitation and training facility who are incapable of independent living but also their surrounding neighbors.[6]

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[5]"In light of *problems unique* to handicapped persons," (emphasis supplied), the Ninth Circuit held that the FCC's justification of its refusal to include the handicapped in its EEO program was reasonable and, therefore, the FCC did not violate equal protection under the rational basis test. *California Association of the Physically Handicapped v. Federal Communications Commission*, 721 F.2d 667, 670 (9th Cir. 1983), cert. denied, 105 S.Ct. 121 (1984).

[6]All of the applicants who desire to operate businesses in a R-3 District, i.e., hospitals, sanitariums, nursing homes or homes for convalescents or aged for the insane or feeble minded or alcoholic or drug addicts, or penal institutions, are required by Section 8 of the Ordinance to obtain a special use permit for that purpose, which requirement is linked to deficits in adaptive behavior and/or to maladaptive behavior of those the applicants are seeking to serve. Amici American Association on Mental Deficiency, et al., has pointed out that impairment in adaptive behavior is not to be confused with maladaptive behavior at page 4 of their Brief. However, Tex. Dept. of Human Resources Code, 40 TAC § 27.102, 9 Tex. Reg. 4413 (1984) printed at 9 Tex. Reg. 978 (1984) has stated the following in defining the "adaptive behavior level" for level-of-care criteria in ICF-MR I facilities of which Amici AAMD, et al., neglected to inform the Court in their Brief:

> For the purpose of these rules, deficits in adaptive behavior are identified according to American Association on Mental Deficiency's adaptive behavior levels (ABL I, II, III, or IV) as presented in the Association's *Classification in Mental Retardation*, 1983 revision. *Assignment of an adaptive behavior level includes assessment of any maladaptive behavior.* Maladaptive behavior may influence the individuals independence in skills, performance, self-motivation, and acceptability within his community. Maladaptive behaviors are inappropriate behavior, emotional disturbances, or personality disorders. (emphasis supplied)

In addition, it should be noted that the use of restraint, chemical or physical, is an acceptable method of behavior management at ICF-MR Level I facilities in the State of Texas. See *Minimum Licensing Standards for Facilities Serving the Mentally Retarded*

Also, if 201 Featherston Street were a boarding house, it would not be housing thirteen adult men and women in its limited space of 2510 square feet which has only four bedrooms and two and a half baths. Nor should an ICF-MR facility place that many people under such a small roof. Not only is this condition overcrowded, it is detrimental to the well being of the residents, a concept recognized by the Texas Department of Human Resources when it adopted Tex. Dept. Human Resources, Rule 326.35.03.005, 7 Tex. Reg. 1641 (1982)[7] limiting the number of residents at an ICF-MR facility to a maximum of six persons.

Section 16 of the Ordinance provides that a home for the mentally retarded

> may be located in any district by Special Use Permit of the Governing Body, . . . under such conditions as to operation, site development, . . . as may be deemed necessary in order that such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purposes of this Ordinance.

The general "intent and purposes" of this Ordinance are found in the Preamble which clearly states that it is designed to regulate "the density of population, and the location and use of buildings, structures, and land for trade, industry,

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Citizens of Texas, Pl. Ex. 25, pp. 9-11, R. Vol. III, p. 290. Jerry Walker, the Administrator of the ICF-MR program for the Texas Department of Health testified that restraints may be used on mildly to moderately retarded persons "depending upon the nature of the need for the restraint." (J.A. Vol. III, p. 304).

[7]This TDHR regulation, attached as Appendix A, was adopted on April 9, 1982 and became effective on May 17, 1982. The rule was proposed in 7 Tex. Reg. 58 (January 8, 1982) which appears at J.A. 78-81 as Def. Ex. 10, R. Vol. III, p. 304.

residence or other purposes." (J.A. 49-50, Pl. Ex. 1, p. 1153-1154, R. Vol. II, pp. 6, 7). The Ordinance explicitly goes on to state:

> FOR THE PURPOSE OF PROMOTING HEALTH, SAFETY, MORALS, AND THE GENERAL WELFARE OF THE COMMUNITY, THE GOVERNING BODY OF CLEBURNE DEEMS IT NECESSARY TO ADOPT THE REGULATIONS MADE IN ACCORDANCE WITH A COMPREHENSIVE PLAN AND DESIGNED TO LESSEN CONGESTION IN THE STREETS; TO SECURE SAFETY FROM FIRE, PANIC AND OTHER DANGERS; TO PROMOTE HEALTH AND THE GENERAL WELFARE; . . . [AND] TO AVOID UNDUE CONCENTRATION OF POPULATION.

Clearly, these purposes and objectives of the City's Zoning Ordinance are permissible and are equally applicable to thirteen unidentified potential residents and a potential provider of an ICF-MR facility which seeks to locate a site and use an existing inadequate building in the City of Cleburne, as well as the non-mentally retarded who happen to be their neighbors at the proposed location of the ICF-MR facility. *Village of Belle Terre v. Boraas, supra,* 416 U.S. at 6, articulated the concept of the public welfare as "broad and inclusive" and

> the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. (citation omitted)

This concept has stood the test of time and was most recently relied upon by Justice Stevens writing the opinion for this Court in the zoning case of *Members of the City*

Council of the City of Los Angeles v. Taxpayers for Vincent, 104 S.Ct. 2118, 2129 (1984).

The facts which the members of the City Council considered in their decision to deny Jan Hannah a special use permit for the house at 201 Featherston Street were legitimate concerns expressed in conformance with the criteria set out in Section 16 of the Ordinance, the Preamble to the Ordinance, and *Village of Belle Terre, supra.* See J.A. 95.

The Respondents' and certain of the Amici's characterization of the objectives of the Ordinance and the factors which the City Council considered in their decision to deny a special use permit to Jan Hannah as *post hoc* rationalizations are unfounded and untrue.[8] They scoff at the City's concern over the safety of the proposed residents in regard to the heavy traffic in the area of a junior high school and the location of the house in the 500 year flood plain. However, Mr. Justice Stevens, writing the opinion for this Court in *City of Memphis v. Greene*, 451 U.S. 100, 127, 101 S.Ct. 1584, 1600 (1981) stated that a city's safety interest

> . . . . is equally legitimate whether it provides support for an arguably unnecessary preventive measure or for a community's reaction to a traffic accident that adequate planning might have prevented.

The request of the majority of property owners within 200 feet of 201 Featherston Street for denial of the permit was also considered by the City Council. (J.A. 95). How-

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[8]In fact, David Southern, an officer of the CLC, testified that at both the City of Cleburne Planning and Zoning Commission meeting as well as at the City Council meeting, "possible flooding, the traffic problems, and the size and use of the house" were topics of discussion. (J.A. 34, R. Vol. II, p. 86). See Pl. Ex. 20, R. Vol. II, pp. 6, 7, and Pl. Ex. 26, R. Vol. II, pp. 6, 7.

ever, the Council did not delegate its zoning authority to these residents as was done in *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50 (1928). The District Court found that the Respondents were also "given a full and fair" opportunity to voice their views to the City Council concerning their application for a special use permit. (J.A. 95). This Court has stated that

> our decisions do not authorize courts to pick and choose among legislative aims to determine which is primary and which subordinate . . . The search for legislative purpose is often elusive enough, (cite omitted), without a requirement that primacy be ascertained.

McGinnis v. Royster, 410 U.S. 263, 276, 93 S.Ct. 1055, 1062-1063 (1973). Therefore, while the City Council considered the views of the property owners within 200 feet of the affected property as well as the views of the Respondents themselves, the weight of the factors in their decision to deny Jan Hannah a special use permit is unimportant.

> Rather, legislative solutions must be respected if the distinctions drawn have some basis in practical experience (cite omitted), or if some legitimate state interest is advanced. (cite omitted). So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying.

McGinnis, supra, 410 U.S. at 276.

The City's Ordinance does not frustrate State public policy as the Amici State of Texas and TDMHMR and the Respondents have alleged,[9] but rather complements the

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[9]All state claims under the Texas Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann. art. 5547-300, Section 7, were voluntarily dismissed by Respondents. (J.A. 84-87).

State's role in delivering services to mentally retarded men and women. Fears of the Respondents and certain of the Amici regarding a trend toward reinstitutionalization should the Fifth Circuit's decision be overturned and the Ordinance held to be constitutionally valid, are totally unfounded. Both the Amicus TDMHMR and the City of Cleburne are assigned certain tasks by the Legislature of the State of Texas. From funds available to it, Amicus TDMHMR "is authorized to provide . . . mental retardation services through the operation of halfway houses, community centers, and other mental health and mental retardation services programs." Tex. Rev. Civ. Stat. Ann. art. 5547-202, § 2.17(a) (Vernon Supp. 1985). "For the purpose of promoting health, safety [and] morals," the City of Cleburne is "empowered to regulate . . . the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose." Tex. Rev. Civ. Stat. Ann. art. 1011a (Vernon Supp. 1985).

The Texas Dept. of Human Resources, Rule 326.35.03.005, 7 Tex. Reg. 1641 (1982) requires that

> (a) Effective May 1, 1982, *all* applications (I, V, VI) for participation in the ICF-MR Program . . . must meet the following requirements.
>
> * * *
>
> (A) The proposed facilities must be located in an *incorporated City* which is *subject to special use permit requirements, local zoning*, and/or occupancy code requirements . . . (emphasis supplied)

The preamble to the Rule states that "[t]he requirements affect *facility size and site location* . . . These criteria ensure that facilities will be residences that are well-integrated into the local community." (emphasis supplied). See Appendix A. Clearly, the Texas Department of Human Resources has

unequivocably articulated the policy of the State of Texas in regard to the role of the municipality *vis-a-vis* the ICF-MR facility. Not only is there no prohibition in State law against the City regulating the location of an ICF-MR facility, it appears that such a special use permit requirement is actually necessary to carry out the State's policy of placing such facilities in the community. In requiring that TDMHMR provide certain services, the Legislature of the State of Texas has not emasculated the City of Cleburne's zoning authority. In fact, "[w]henever the regulations made under authority of this Act (Articles 1011a-1011j) impose higher standards than are required in any other statute . . . or regulation, the provisions of the regulations made under authority of this Act shall govern." Tex. Rev. Civ. Stat. Ann. art. 1011j (Vernon 1963). Therefore, if TDMHMR did not require a special use permit and there were a conflict between the Ordinance and the regulations, the Ordinance governs because it "imposes a higher standard" in its requirement that in order to operate an ICF-MR facility in the City of Cleburne, an applicant must request and obtain a special use permit. The State of Texas and TDMHMR have incorrectly attempted to narrow the scope of the Legislature's entitlement of zoning authority to the City of Cleburne. See Brief for Amici State of Texas and TDMHMR at p. 14.

The fact situation in the case at bar is similar to that in *Macon Association for Retarded Citizens* in which the proposed group homes were to be regulated and administered through the Mental Health Division of the Georgia Department of Human Resources. *Supra*, at 220. The petitioner contended that the decision violated the policy of the State of Georgia which accepted statutory responsibility for its mentally retarded citizens, the primary purpose of the legisla-

tive policy being "to provide community-based alternatives to total institutional care so that mentally retarded individuals can continue to live in their home communities." *Supra*, at 220, 221. The petitioner in *Macon Association for Retarded Citizens* also contended that the respondent's decision was "null and void because the petitioner's governmental function of providing housing for the mentally retarded [was] immune from operation of the Resolution." *Supra*, at 220. The Georgia Supreme Court held that property owned by the petitioner corporation was not immune from local zoning regulations, even if the corporation was performing services which were governmental in nature, at least in the absence of a clear expression of intent by the legislature that such immunity be extended. *Macon Association for Retarded Citizens, supra*, at 223.

The Respondents, Amici State of Connecticut, et al., and Amici American Association on Mental Deficiency, et al., attempt to discount the effect of according "quasi-suspect" status on the mentally retarded upon governmental legislation. In fact, Amici AAMD, et al., specifically refer to laws "beneficial to retarded people." Brief of AAMD, et al. at p. 27, n. 39. As the Fifth Circuit dissent to the rehearing en banc pointed out — what legislation is an advantage to the mentally retarded and what legislation a disadvantage to the mentally retarded is often difficult to discern for even those who seek to improve the condition of mentally retarded men and women. See J.A. 140-142. Indeed, what might seem to be an apparent advantage to the mentally retarded might ultimately result in a disadvantage to the mentally retarded.

Respondents have attempted to summarily dismiss this impact as highly improbable. See Respondents' Brief at p. 40. However, the United States Department of Justice as well

as the Petitioners have recognized the inherent problems affecting all levels of legislation if the mentally retarded are held to be a "quasi-suspect" class.

The City Ordinance was promulgated pursuant to valid delegation of authority from the Legislature as interpreted by the Supreme Court of the State of Texas in *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982), cert. denied, 459 U.S. 1087, 103 S.Ct. 570 (1982):

> Zoning regulation is a recognized tool of community planning, allowing a municipality, in the exercise of its legislative discretion, to restrict the use of private property. *Village of Euclid v. Ambler Realty Co.* (cite omitted)

Petitioners submit that the classification found in the Ordinance is based on fact and meets the rational basis standard articulated by this Court, and therefore:

> the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective." *McGowan v. Maryland*, 366 U.S., at 425, 81 S.Ct., at 1105.

Harris v. McRae, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691 (1980). Furthermore, "legislative solutions must be respected if the 'distinctions drawn have some basis in practical experience,' . . . or if some legitimate state interest is advanced." *McGinnis, supra*, 410 U.S. at 276. For this Court has observed that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations, — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443 (1913), quoted in *McGinnis, supra*, 410 U.S., at 270.

II. SUGGESTION OF MOOTNESS BY AMICI

Amici National Association for Rights Protection and Advocacy, et al., have suggested to this Court that the case at bar is moot because the proposed facility will violate the six bed requirement of Tex. Dept. of Human Resources, Rule 326.35.03.005, 7 Tex. Reg. 1641 (1982). Respondents disagree and contend they are exempt from the Rule. See Brief of Respondents, p. 24, n. 11. Petitioners have always contended that the six bed limitation in Rule 326.35.03.005 is applicable to Respondents. See Petition for Certiorari at Statement of the Case, p. 4; Brief for Petitioners, p. 31; Brief of Appellees, No. 82-1565, pp. 6-7; and Appelles' Petition for Rehearing, No. 82-1565, p. 8.

The language of Rule ".005" is quite clear — it applies to *all applications* for ICF-MR Level I facilities, not just those filed after May 1, 1982. The Administrator of the ICF-MR program for the Texas Department of Health testified that ".005" was applicable to Respondents. He explained that every facility in the State of Texas which seeks to enter into a contract to participate in the ICF-MR I program must be certified on a yearly basis and when asked in reference to Rule ".005" if an ICF-MR Level I facility wanted to keep more than six people, would it be able to be certified after May 1, 1982, he replied, "No, sir." (J.A. 43, R. Vol. III, pp. 284, 303).

Clearly, Tex. Dept. of Human Resources, Rule 326.35.03.005, is applicable in the case at bar and precludes Respondent from being certified as an ICF-MR facility for

thirteen residents.[10] Therefore, not being able to break even financially with less than ten or eleven people, Respondents would be unable to open an ICF-MR facility for six people on which they could not even break even. (J.A. 32, R. Vol. II, pp. 59-60).

Should this Court determine this case is moot, the appropriate ruling is not a dismissal of the Writ of Certiorari as suggested by Amici National Association for Rights Protection and Advocacy, but rather, this Court should reverse or vacate the judgment of the Fifth Circuit and remand the case to the Fifth Circuit for entry of an appropriate order directing the District Court to dismiss the action as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106 (1950).

III. PETITIONERS HAVE NOT VIOLATED THE ANTI-DISCRIMINATION PROVISIONS OF SECTION 504 OF THE REHABILITATION ACT OR THE REVENUE SHARING ACT

The brief of Amici Curiae for the American Civil Liberties Union, et al., suggests that this Court render a decision in favor of Respondents based on the anti-discrimination provisions of the Revenue Sharing Act (31 U.S.C. § 6716) and

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[10]An unnamed "undersigned counsel" for Amici State of Texas and TDMHMR claims that he "has consulted the appropriate state officials and can inform this Court that the 'six bed rule' would not pose an obstacle to the proposed Featherston Street group home." State of Texas and TDMHMR Brief at p. 15, n. 7. This statement is outside of the record and does not state that the thirteen bed facility would be certified.

These Amici also contend that the house at 201 Featherston Street was "approved for the intended use by the appropriate State authorities." See State of Texas and TDMHMR Brief at p. 2. This contention is also untrue. There is no evidence or finding to support this allegation. The State requested repairs had not even been done at time of trial. (R. Vol. II, pp. 174-175).

Section 504 of the Rehabilitation Act (29 U.S.C. § 794), even though both the District Court and the Fifth Circuit ruled in favor of Petitioners on these points. (J.A. 98, 120). These Amici assert their authority to raise these issues, even though Respondents have not raised them, under this Court's doctrine that a *prevailing party* may urge any ground in support of the judgment. *United States v. Arthur Young & Co.*, 104 S.Ct. 1495, 1501 (n. 12), (1984). However, Amici are not parties to this proceeding, prevailing or otherwise, and have improperly interjected issues wholly foreign to the questions presented on which the grant of certiorari was based. See *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62, 101 S.Ct. 1559, 1562 (n. 2) (1981), *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171 (1979), U.S. Sup. Ct. Rule 21.1(a), 28 U.S.C.A.

Although correctly acknowledging the program-specificity requirements of both Section 504 and the Revenue Sharing Act, Amici attempts to circumvent this Court's recent decision in *Grove City College v. Bell*, 104 S.Ct. 1211 (1984), in that regard, by arguing that the City has excluded mentally retarded persons altogether from the City, per se, and that, therefore, they are excluded from programs within the City that do receive federal funds. Their premise that mentally retarded persons are altogether excluded from the entire City is fallacious. The Ordinance has been in place since 1965 and mentally retarded people live within the City of Cleburne and have complete access to all of its services and amenities. (R. Vol. II, pp. 214-215). If this Court were to accept Amici's argument that the special use permit requirement is a per se exclusion from the City, then it would also follow that all persons, for whom a business which deals with them is required to have a special use permit, are also ex-

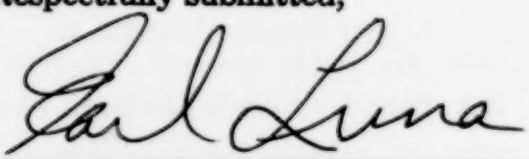
cluded from the City. For example, nursery schools are required to have a special use permit, therefore, all children are completely excluded from the whole City. This argument is totally unrealistic and untenable.

This case is squarely within the *Grove City College, supra*, holding wherein BEOG tuition grants to a student for college tuition represented federal financial assistance only to the College's own financial aid program and, therefore, only that program was within Title IX's anti-discrimination provisions. Likewise, in the present case, the City has shown that its zoning activities are not federally funded and are, therefore, not subject to the anti-discrimination provisions of Section 504 of the Rehabilitation Act and the Revenue Sharing Act. (J.A. 98), (J.A. 120), and (J.A. 70-72, Pl. Ex. 5, R. Vol. II, pp. 6, 7).

CONCLUSION

For the reasons discussed, this Court should declare that the mentally retarded do not constitute a "quasi-suspect" class, the challenged zoning ordinance should be scrutinized at the rational basis level of review, found to be constitutional, as written and as applied, the judgment of the Court of Appeals should be reversed and the judgment of the District Court should be affirmed, or, in the alternative, if this Court determines this cause to be moot, this Court should reverse or vacate the judgment of the Fifth Circuit and remand the case to the Fifth Circuit for entry of an appropriate order directing the District Court to dismiss the action as moot.

Respectfully submitted,



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March 6, 1985

CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Petitioners' Reply Brief on all parties required to be served and on all Amici Curiae by depositing three copies of the same in the United States mail, on the 6th day of March, 1985, with first-class postage prepaid addressed to the following counsel of record at the addresses indicated, to-wit:

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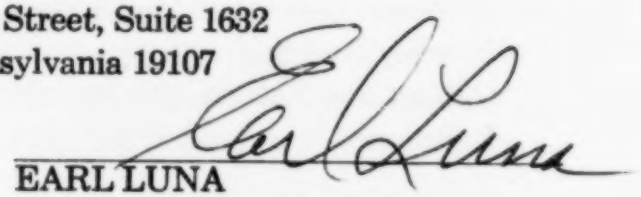
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Appendix A

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Resources

(Editor's note: Because the Texas Department of Human Resources' rules have not yet been published in the Texas Administrative Code (TAC), they do not have designated TAC numbers. For the time being, the rules will continue to be published under their Texas Register Division numbers. However, the rules will appear under the agency's correct title and part.)

Intermediate Care Facility for Mentally Retarded

Eligibility for Participation 326.35.03

The Texas Department of Human Resources adopts with changes new Rule 326.35.03.005 in its Title XIX Intermediate Care Facility for the Mentally Retarded (ICF-MR) Program. The rule was proposed in the January 8, 1982, issue of the *Texas Register* (7 TexReg 58).

The rule presents requirements for provider applicants that will improve program administration. The rule applies to potential applicants and current providers requesting an increase in their number of certified contracted beds. The requirements affect facility size and site location. The requirements also include documentation of the service need met by the provider and of the programmatic services that will be provided. These criteria ensure that facilities will be residences that are well-integrated into the local community, meet a service need in coordination with other mental retardation/developmental disability service providers, and are accessible to programmatic resources.

The rule exempts the Texas Department of Mental Health and Mental Retardation state school and human development center ICF-MR providers. This exclusion is based on Article II, § 4(a), p.11-67 in the 1981-1982 General Appropriations Act, 67th Legislature, 1981, which states that the Texas Department of Mental Health and Mental Retardation shall maximize the amount of medical assistance paid

on behalf of patients in state hospitals for mental disease and in the state schools for the mentally retarded.

Comments were received from the Texas Association for Retarded Citizens and the Texas Society for Autistic Citizens. Both parties disagreed with the exclusion of state school ICF-MR providers and the three-mile radius factor. Both parties also requested the inclusion of a requirement that applicant providers intending to serve Level I clients present evidence of access to less restrictive alternatives to ICF-MR services.

In regard to the exclusion of state school providers, the Texas Department of Mental Health and Mental Retardation must comply with the intent of the General Appropriations Act. Therefore, no change was made in the exception stated in the rule.

In regard to the three-mile radius requirement, the department has retained the requirement and cites the approval given by the ICF-MR Executive Committee representing providers, state agencies, and advocacy organizations, as evidence of the acceptability of this criterion.

The department agrees with the comments that the requirement of Level I providers regarding less restrictive residential alternatives meets legislative intent and the comment has been included (subsection (a) (6)).

Subsection (a) has been amended to clarify the exclusion of Texas Department of Mental Health and Mental Retardation human development centers, as well as state schools.

Subsection (a) (5) has been amended to include examples of program support services which may require description. Also, minor editorial changes have been made.

The following rule is adopted under the authority of the Human Resources Code, Title 2, Chapters 22 and 31, which authorizes the department to administer public assistance.

.005. *Provider Applications.*

(a) Effective May 1, 1982, all applicants (I, V, VI) for participation in the ICF-MR Program, with the exception

of Texas Department of Mental Health and Mental Retardation state school and human development center ICF-MR providers, must meet the following requirements.

(1) Requested certification is limited to a maximum of six beds per facility, whether the facility is currently certified or whether the request is for certification for a new facility.

(2) The proposed facility is located within a given community according to the following specifications.

(A) The proposed facility must be located in an incorporated city which is subject to special use permit requirements, local zoning, and/or occupancy code requirements, and must be noncontiguous to an already existing facility.

(B) No other ICF-MR residential facility is located within the same neighborhood within a three-mile radius.

(C) Access to community resources is documented (as appropriate to level of client).

(3) A needs assessment has been conducted to include the following.

(A) Identification is made of the number of developmentally disabled persons residing in the community and surrounding geographic area (defined in assessment) that can benefit from the services provided by the facility.

(B) Other ICF-MR residential facilities, if any, located within the same community and/or geographic area are identified by name. Number and level of clients served is also stated.

(C) If the facility serves the mentally retarded, letters are obtained from at least the superintendent of the state school and the executive director of the local MH/MR

center (if applicable) in whose catchment area the proposed facility is located. Letters from the state school and community center must include a statement as to the number of persons who will meet the basic admission criteria to the facility. The applicant also should state the number of potential referrals from other state schools and MH/MR programs according to program location.

(D) If the facility serves clients other than the mentally retarded, the applicant must obtain letters, stating the service needs, from the appropriate referral sources.

(4) A written description of the client group to be served, including admission criteria, is submitted.

(5) The applicant must develop a description of the educational, medical, vocational, and any other programmatic support services (as defined by Code of Federal Regulations 442.400) which are required by the clients served. The applicant must send a copy of either a letter of intent, memorandum of understanding, or contract with the service provider, together with the description of each service identified. The purpose of the letters, memoranda, and contracts is to provide evidence that the required services are available to the facility.

(6) If the applicant plans to serve Level I clients, a written description of alternatives for semi-independent and independent living available to the facility for those clients who successfully complete the active treatment plan and evidence of their ability to move to a less restrictive placement must be submitted. In the absence of these alternatives, the facility must present evidence of having initiated planning for the development of these alternatives.

(b) After the Texas Department of Mental Health and Mental Retardation receives the application for participation in the ICF-MR Program and before request for a certification survey by the Texas Department of Health, the Texas

Department of Mental Health and Mental Retardation staff meets the applicant to determine whether the requirements of the program have been met. The contract for services is dependent on satisfactory compliance with these criteria.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 9, 1982.

TRD-823180

Marlin W. Johnston
Commissioner
Texas Department of Human Resources

Effective date: May 17, 1982

Proposal publication date: January 8, 1982

For further information, please call (512) 441-3355, ext. 2037.